

(1985) 04 KL CK 0026

In the High Court Of Kerala

Case No : Income-tax Reference No. 232 of 1979

Commissioner of Income Tax

APPELLANT

Vs

C.P. Antony

RESPONDENT

Date of Decision : 12-04-1985

Acts Referred:

Income Tax Act, 1961 — Section 139, 147, 271, 271(1)

Citation : (1985) 155 ITR 467

Hon'ble Judges : K. Bhaskaran, C.J;P.C. Balakrishna Menon, J;G. Sivaraman Nair, J

Bench : Full Bench

Advocate : P.K. Ravindranatha Menon, for the Appellant; P. Gopalakrishna Warriar, for the Respondent

Judgement

Bhaskaran, C.J.—The Income Tax Appellate Tribunal Cochin Bench, has referred to this court, the following question of law which is said to arise out of the Tribunal's order in I.T.A. No. 54 (Coch)/76-77, dated October 12, 1978, u/s 256(1) of the I.T. Act, 1961 (hereinafter referred to as "the Act"):

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that penalty had to be levied with reference to return filed on December 31, 1965, notwithstanding the fact that in the return filed on January 5, 1970, the assessee had returned as total income only the income as originally assessed of Rs. 49,710 ?"

2. The assessee is a registered firm. For the accounting year ending with March 31, 1965 (for the assessment year 1965-66), the assessee-firm filed a return on December 31, 1965, showing an income of Rs. 33,979. The assessment was completed on June 13, 1966, on an income of Rs. 49,710. Annexure "A" is the copy of this order of assessment. Investigations made by the ITO subsequently revealed that certain credits aggregating to Rs. 58,000 in the books of account of the assessee-firm represented the income of the assessee-firm itself. The ITO, therefore, on September 10, 1969, initiated reassessment proceedings, u/s 147

of the Act against the assessee-firm. In compliance with the notice issued for reassessment, the assessee-firm filed a return on January 5, 1970, showing an income of Rs. 49,710 which was the total income assessed originally by the ITO for the assessment year 1965-66. When the matter was taken up for assessment, the assessee-firm submitted a petition to the Commissioner of Income Tax requesting for a settlement of the whole matter, offering a sum of Rs. 1,67,500 to be distributed over the accounting years 1963-64 to 1965-66. For the assessment year 1965-66, the amount came to Rs. 40,000. The Commissioner, however, rejected the assessee-firm's request for waiver or reduction of penalty, and by order dated March 15, 1971, confirmed these assessment proceedings. Thereafter, the ITO on February 17, 1971, wrote a letter to the assessee regarding the additions to be made. The assessee-firm by its letter dated March 16, 1971, agreed to an addition of Rs. 50,000 for the assessment year 1965-66. The assessee-firm also filed a return on November 2, 1973, showing an income of Rs. 98,983. This was arrived at by adding Rs. 58,000 representing the cash credits to the income, as per the original return of Rs. 33,979. The ITO completed the assessment on August 30, 1974, adding Rs. 58,000 to the originally assessed income of Rs. 49,710. Annexure "B" is the copy of the revised assessment order.

3. The ITO had even prior to the passing of the revised assessment order (annexure "B") initiated penalty proceedings and referred the matter to the IAC, who, on February 9, 1976, imposed a penalty of Rs. 58,000 on the assessee-firm. Annexure "C" is the copy of the said order dated February 9, 1976. On appeal, the Tribunal, while holding that there was sufficient material with the Department for the levy of penalty, granted some relief, directing the ITO to re-work the quantum with reference to the tax avoided, i.e., with reference to the liability as it stood in 1965, and fixing the penalty to be levied at the minimum under the statute, that is to say, 20 per cent. of the tax avoided. Annexure "D" is the copy of the Tribunal's order dated October 12, 1978.

4. The bone of contention in this reference is the point of time at which the concealment of income took place, which, in its turn, would have a bearing on the question as to the provision of law to be applied for fixing the penalty, that is to say, whether the provisions of Section 271(1) of the Act, as it stood prior to its amendment in 1968 or as it stood on January 5, 1970, after the amendment of 1968, would apply to the facts of the case,

5. It would be advantageous to look into the scheme of the Act pertaining to the imposition of penalty. Every person is bound u/s 139 of the Act to furnish a return of his real, correct total income. In case the return is accepted by the ITO, he makes an assessment u/s 143(1) on the basis of the return submitted by the assessee. The ITO may, however, if he has reason to believe that there was omission or failure on the part of the assessee to make a return u/s 139 for any assessment year or to disclose fully and truly all material facts necessary for his assessment for that year or income chargeable to tax has escaped assessment

for the year, subject to the provisions of Sections 148 - 153 of the Act, assess or reassess such income u/s 147(a) of the Act, for the assessment year concerned. Before making the assessment, reassessment or recomputation, u/s 147, the ITO is bound to serve a notice u/s 148 on the assessee and the provisions of the Act shall, so far as may be, apply accordingly, as if the notice were a notice issued under Sub-section (2) of Section 139. If the ITO is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income, he may, u/s 271(1)(c) of the Act, impose penalty as provided under that section. Under the provision that existed prior to April 1, 1968, penalty for concealment of income or for furnishing of inaccurate particulars of income has to be not less than 20 per cent. of the tax payable, however, so that it is not to exceed one and half times the amount of tax, if any, which would have been avoided, if the income as returned by such person had been accepted as the correct income. Under the amended provisions of Section 271(1), as it stood on April 1, 1968, penalty imposable, besides the tax payable by him, shall not be less than, but which shall not exceed twice, the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished. In the case covered by the provisions u/s 271, as it stood prior to April 1, 1968, the penalty imposable is with reference to the tax payable, whereas in the case covered by the provisions of that section as amended, and which came into effect from April 1, 1968, penalty imposable is with reference, to the income concealed. In either case, it is the concealment of particulars of income or furnishing of inaccurate particulars of income in the return filed by the assessee that attracts penal proceedings. The ITO invokes Section 147 of the Act if he has reason to believe that the income chargeable to tax has escaped assessment for that year. It might be that where the ITO invokes the provision u/s 147(a) and issues a notice u/s 148 of the Act, the assessee may submit a revised return, which might be the same as the assessee filed at the first instance. It could also be that the revised return makes a partial or full disclosure of the income concealed at the time when he filed the first return u/s 139. It might be possible u/s 147 to reopen an assessment by way of reassessment where it is found that any income of the assessee had escaped assessment. It has, however, to be noticed that what is relevant is a finding that in the original return the assessee had concealed particulars of his income or has furnished inaccurate particulars of his income. The logical conclusion, therefore, is that if an assessee who was bound to disclose his real total income in the return filed by him u/s 139 fails to do so, the concealment or furnishing of inaccurate particulars with respect to his income in that return, the offence becomes complete. In other words, in regard to commission or completion of the offence of concealment or furnishing of inaccurate particulars of income, with reference to the return filed by the assessee u/s 139, his persistence in concealing his income or his persistence in furnishing incorrect particulars with reference to his income chargeable to tax, would not constitute fresh causes of action or repetition of the offence. The legal position admits of no doubt. We notice that the purpose of the enquiry u/s 147 of the Act is to determine the concealed or the escaped income. Where a return u/s

139 has been filed, it may have reference to that. In the instant case, the Tribunal has taken the correct view when it held that penalty proceedings have to be completed, in accordance with the provisions of Section 271 as it stood at the time when the assessee filed the return u/s 139 on December 31, 1965.

6. Sri P. K. Ravindranatha Menon, counsel for the Central Government (Taxes), referred to the decision of the Supreme Court in *N.A. Malbari and Bros. Vs. Commissioner of Income Tax, Bombay*, . The Supreme Court had to consider in that case the scope of Section 28(1)(c) and 28(3) of the Indian I.T. Act, 1922 (corresponding to Section 271(1)(c) of the 1961 Act). The facts of the case, shortly stated, were as follows : For the assessment year 1951-52, in respect of which the accounting year was the calendar year 1950, the assessee submitted a return. The assessee was carrying on his business at Surat. It had a branch at Bangkok to which it exported cloth from India. The branch also made purchases locally and sold them. In the return furnished by the assessee, for the year 1951-52, there was no reference to the Bangkok branch business profits. The ITO thereupon issued a notice u/s 22(4) of the Act (old Act) directing the assessee to produce the profit and loss account and balance-sheet with the relevant books. The assessee excused itself by saying that the books were at Bangkok and the profit and loss account and the balance-sheet could not be produced. Thereupon, the ITO made an estimate of the sale of the Bangkok branch at Rs. 7,50,000 and the net profits thereon at Rs. 37,500. This assessment order was made on January 31, 1952. On the same day, he issued a notice u/s 28(3) (of the old Act), requiring the assessee to show cause why penalty u/s 28(1)(c) for concealment of the particulars of the income of 1950 should not be levied. After hearing the assessee, the ITO imposed a penalty of Rs. 20,000 on the ground that the explanation of the assessee was not acceptable. In the course of the assessment proceedings for the year 1952-53, the assessee produced the account books of the Bangkok branch. The books revealed that the assessee had made a profit of Rs. 1,25,520 in the calendar year 1950. The ITO thereupon commenced proceedings u/s 34 of the (old) Act and gave notice to the assessee to submit a return. The assessee submitted a return stating therein the correct profits it had made for the calendar year 1950. The ITO issued notice u/s 28(3) requiring the assessee to show cause why penalty should not be levied for deliberately concealing the particulars of his income of 1950. Pursuant to this notice, the ITO passed another order on February 28, 1957, imposing a penalty of Rs. 68,501. Thus, there were two orders of penalty. The assessee appealed to the AAC against both the aforesaid orders of penalty but the appeals were rejected. The assessee then appealed to the Tribunal. The Tribunal held that it was not in a position to understand the action of the Department in splitting up one offence into two proceedings, and quashed the first order imposing penalty of Rs. 20,000 but sustained the levy of Rs. 68,501. On a reference, the High Court of Bombay agreed with the contention of the assessee that two penalties could not be levied in respect of identical facts ; but at the same time held that it did not accept the contention of

the assessee that the penalties in that case were levied on the same facts ; and sustained the order of the Tribunal. It was contended before the Supreme Court that there was only one concealment and the second order for penalty was illegal in that there had been only one concealment and in respect of that an order for penalty of Rs. 20,000 had already been passed; and the ITO had no jurisdiction to make a second order of penalty while the first order stood and for that reason the second order must be treated as a nullity. Rejecting this contention, Sarkar J., who spoke for the Bench, stated as follows at page 298 of the report:

"We are unable to accept this argument. It may be that in respect of the same concealment, two orders of penalty would not stand but it is not a question of jurisdiction. The penalty under the section has to be correlated to the amount of tax which would have been evaded if the assessee had got away with the concealment. In this case, having assessed the income by an estimate, the Income Tax Officer levied a penalty on the basis of that estimate. Later when he ascertained the true facts and realised that a much higher penalty could have been imposed, he was entitled to recall the earlier order and pass another order imposing the higher penalty. If he had omitted to recall the earlier order, that would not make the second order invalid. He had full jurisdiction to make the second order and he would not lose that jurisdiction because he had omitted to recall the earlier order, though it may be that the two orders could not be enforced simultaneously or stand together. However, in the present case, the earlier order having been cancelled and no objection to the cancellation having been taken, we have only one order and that, for the reasons earlier stated is, in our view, a legal order."

7. On behalf of the Revenue, Shri Menon did not advance an argument that penalty could be imposed as many times as the assessee persisted in concealing the particulars of income or in furnishing inaccurate particulars of income. His contention, on the other hand, was that the above decision of the Supreme Court, *N.A. Malbari and Bros. Vs. Commissioner of Income Tax, Bombay*, is an authority for the proposition that though with respect to one assessment order only one penalty could be imposed, the act of concealment could be traced to any of the returns submitted by the assessee without it being confined to the return filed u/s 139. We find it difficult to agree with this line of reasoning ; and we are not prepared to accept the contention that the decision of the Supreme Court referred to above, either expressly or by necessary implication, lends any support to this reasoning. The decision of the Supreme Court in *N.A. Malbari and Bros. Vs. Commissioner of Income Tax, Bombay*, is important inasmuch as it makes it clear that with respect to the assessment for one year, there could be one penalty imposed ; and if a second time it is found necessary to levy enhanced penalty, it could be done only by recalling the earlier levy of penalty. In other words, there could only be one enforceable order of penalty.

8. Shri Menon cited another decision of the Supreme Court in *Mansukhlal and Brothers Vs. Commissioner of Income Tax, Bombay City II*, . The question that

arose in that case was whether maximum penalty could be only one and half times on the tax payable on the concealed income or whether it was one and half times the difference between the tax on the total income as finally assessed and the tax on the income shown in the assessee's return, irrespective of the amount of concealed income. We find that this decision has hardly any relevancy on the issue raised in the present case. Shri Menon also cited the decision of the Supreme Court in *The Commissioner of Sales Tax, Madhya Pradesh Vs. H.M. Esufali, H.M. Abdulali, Siyaganj, Main Road, Indore, ,* wherein at page 280 it is observed I

"What is true of the assessment must also be true of reassessment because reassessment is nothing but a fresh assessment. When reassessment is made u/s 19, the former assessment is completely reopened and in its place fresh assessment is made. While reassessing a dealer, the assessing authority does not merely assess him on the escaped turnover but it assesses him on his total estimated turnover."

9. The importance of this decision is that it asserts that what is true of assessment must be true of reassessment also. This, however, could not be understood to imply that if a penalty could be imposed after the assessment, another penalty also could be imposed after reassessment while the penalty earlier imposed remains without being recalled. In fact, as already noticed, what is relevant for the purpose of imposing penalty is the amount of tax attempted to be avoided or the income sought to be concealed and that could be arrived at by the process of deducting from the income found to be chargeable to tax ultimately, the income returned by the assessee when he filed the return u/s 139.

10. The Madras High Court found in the decision in *Commissioner of Wealth-tax Vs. M.V. Rajamma, ,* that "the law applicable for the imposition of penalty will have to be determined with reference to the date on which the original return for wealth-tax was filed. Even though the same concealment existed in the return filed in the reassessment proceedings, no fresh cause of action arose for the levy of penalty when the second return was filed as it was only a continuation of what had happened earlier ".

11. Shri Menon also drew our attention to the decisions of the various High Courts reported in *Additional Commissioner of Income Tax Vs. Balwant Singh Sulakhanmal, , Addl. Commissioner of Income Tax Vs. Brijmohan Jaiswal, , B.N. Sharma Vs. Commissioner of Income Tax, , Commissioner of Income Tax Vs. Lalji Ram Bhagat, and Commissioner of Income Tax Vs. Monghyr Gun Manufacturing Co-operative Society Ltd., ,* and also the dissenting judgment of Tewatia J. of the Punjab & Haryana High Court in *Commissioner of Income Tax Vs. Ram Singh Harmohan Singh*, On a careful consideration of these decisions, we find ourselves not in a position to accept the reasoning of the minority judgment of Tewatia J. in *Commissioner of Income Tax Vs. Ram Singh Harmohan Singh*, As far as the other decisions relied on by Mr. Menon, we find no detailed discussion for the conclusions reached. We are persuaded to hold that these decisions do not lay

down the correct position of law on the point.

12. We are very much impressed by the forceful arguments of Sri P. Gopalakrishna Warriar for the assessee, who took us through the relevant provisions of the Act and the following decisions in which we find support for the view we have taken, viz., majority decision of the Punjab & Haryana High Court in Commissioner of Income Tax Vs. Ram Singh Harmohan Singh, ; Commissioner of Income Tax Vs. A. Rahman, (to which reference does not appear to have been made in subsequent decisions), Commissioner of Income Tax Vs. Gopal Krishna Singhania, , Commissioner of Income Tax, Tamil Nadu-III Vs. S.S.K.G. Arthanariswamy Chettiar, and Commissioner of Income Tax, Andhra Circle-I, Hyderabad Vs. Rameswar and Co., .

13. In the result, we answer the reference in the affirmative, that is, in favour of the assessee and against the Revenue.

14. A copy of this judgment under the signature of the Registrar and the seal of the High Court would be forwarded to the Income Tax Tribunal, Cochin Bench.